Filed 11/18/16 A.R. v. Superior Court CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

A.R., Petitioner, v. SUPERIOR COURT OF SANTA CRUZ, Respondent; SANTA CRUZ COUNTY HUMAN SERVICES DEPARTMENT, Real Party in Interest.	H043895 (Santa Cruz County Super. Ct. No. 15JU00052)

Petitioner A.R., the father of N.H.,[1] (father), who is incarcerated in state prison, has filed a petition for extraordinary writ (Cal. Rules of Court, rule 8.452), in propria persona, seeking relief from a juvenile court's order setting a hearing under Welfare and Institutions Code section 366.26 with respect to N.H.[2] The Santa Cruz County Human Services Department (Department), the real party in interest, urges us to dismiss or summarily deny the petition as procedurally defective. The Department additionally asserts that father's claims are meritless.

[1] The father of J.H., N.H's half brother, is A.A., and we will refer to A.A. by his initials to avoid confusion. Juvenile dependency petitions were filed on behalf of both minors.

[2] All further statutory references are to Welfare and Institutions Code unless otherwise indicated. All further references to rules are to the California Rules of Court.

We agree that the petition is procedurally defective and without merit. We shall deny the petition.

I

Factual and Procedural History

On November 12, 2015, a juvenile dependency petition was filed on behalf of N.H., who was then two years old, under section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). On December 3, 2015, an amended juvenile dependency petition was filed on behalf of N.H. under the same statutory provisions.

The amended petition alleged the following facts. J.H. (mother) abuses controlled substances including methamphetamine and marijuana, which places her newborn son, J.H., and his two-year-old sister, N.H., at substantial risk of serious physical harm. Mother used methamphetamine and marijuana during her pregnancy with J.H. and while she was the primary caretaker for N.H. Father has a criminal history related to substantial violent conduct, and he was arrested for murder in the first degree, being a felon carrying a loaded firearm in a public place, and participation in a criminal street gang. In 2014, father was convicted of assault with a firearm and sentenced to 24 years in prison. His violent behavior places N.H. at substantial risk of serious physical harm. He is "unable to provide for the safety, supervision, and support for his daughter."

The jurisdiction/disposition report regarding both N.H. and J.H. (the children) stated that father was sentenced to a 24-year prison term on June 30, 2014. Mother had disclosed that father was not the father of J.H. and that he had been incarcerated since June 2013. In the report, the Department recommended that no services be offered to father pursuant section 361.5, subdivisions (b)(12) and (e)(1).[3] The report stated that

[3] Section 361.5, subdivision (b), allows a court to bypass reunification services to a parent in certain circumstances, including "when the court finds, by clear and convincing evidence," "[t]hat the parent . . . of the child has been convicted of a violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code." (§ 361.5, (continued)

father's 24-year prison sentence "extend[ed] beyond the timeline for successful reunification" and that he had no relationship with N.H. The report recommended that reunification services be offered to mother and to A.A.

A jurisdiction/disposition hearing for the children was held on December 16, 2015. As to N.H., the juvenile court found the petition's allegations were true. The court removed N.H. from parental custody, it declared her to be a dependent child of the court, and it ordered reasonable reunification services to mother and visitation between N.H. and mother.

On December 22, 2015, the juvenile court declared father to be a presumed parent of N.H. The court found that father, the previously noncustodial parent, was not requesting reunification services.[4]

The six-month status review report, dated May 31, 2016, recommended that mother continue receiving family reunification services.[5]

---

subd. (b)(12)). When reunification services are not bypassed, section 361.5, subdivision (e)(1), requires the court to provide reasonable services to an incarcerated parent "unless the court determines, by clear and convincing evidence, those services would be detrimental to the child." In determining detriment with respect to a child under 10 years of age, the court must "consider the age of the child, the degree of parent-child bonding, the length of the sentence, . . . the nature of the crime . . . , the degree of detriment to the child if services are not offered . . . , the likelihood of the parent's discharge from incarceration . . . within the reunification time limitations . . . , and any other appropriate factors." (§ 361.5, subd. (e)(1).)

[4] Reunification services may also be bypassed "when the court finds, by clear and convincing evidence," "[t]hat the parent . . . of the child has advised the court that he . . . is not interested in receiving . . . family reunification services or having the child returned to or placed in his . . . custody and does not wish to receive family . . . reunification services." (§ 361.5, subd. (b)(14).)

[5] The six-month status review report indicated that father was serving a 48-month state prison sentence. The discrepancy between the term previously reported in the jurisdiction/disposition report and the term reported in the status review report was not explained, but the social worker preparing the latter report may have misread father's criminal history. The criminal history attached to the jurisdiction/disposition report (continued)

At the hearing for the children on May 31, 2016, father's counsel was present. Counsel informed the court that father was not present because he was in prison and that counsel had received no response from father. A settlement conference and hearing were scheduled for June 28, 2016.

A settlement conference and hearing were held on June 28, 2016. An attorney appeared on behalf of counsel for father. No agreement was reached and the matter was set for a contested review hearing on August 3, 2016.

Notice of the August 3, 2016 contested review hearing and a proof of service of the notice were filed on July 28, 2016. The proof of service does not show that father was served with the notice.

On August 1, 2016, the Department's counsel filed a written "Notice of Change of Recommendation" on behalf of the Department, which indicated that the Department was now recommending termination of reunification services due to the failure of mother and A.A. to regularly participate in services and their lack of substantive progress.

In an addendum report, dated August 3, 2016, the Department recommended termination of family reunification services to mother and A.A. and the setting of a section 366.26 hearing for the children. It indicated that, since May 24, 2016, mother's participation in her case plan activities had been minimal. Mother and A.A. had been unable to demonstrate ongoing sobriety. Neither mother nor A.A. had consistently engaged in services. They had not made substantial progress towards ameliorating the safety concerns that had led to the dependency cases. Domestic violence had led to A.A. being arrested on May 27, 2016, and his anticipated release date was September 8, 2016.

---

indicated that the 2014 sentence consisted of a principle term of four years plus a 20-year enhancement, making a total term of 24 years.

On August 3, 2016, the court held a contested review hearing (§ 366.21, subd. (e)) for the children.[6] While father did not personally appear at the hearing, he was represented by his counsel at the hearing. Father's counsel indicated that father was serving a 24-year sentence in state prison, that father had obtained presumed father status on December 22, 2015, that father had no relationship with N.H., and that father had not requested services. Father's counsel told the court that father was not present at the hearing, and he stated that no transportation order is issued for this type of hearing.

At the end of the August 3, 2016 review hearing, the juvenile court terminated family reunification services and set a section 366.26 hearing for the children on November 29, 2016. The court directed the clerk to mail the information regarding the right to review by writ to father and to mother. It ordered supervised visitation between mother and N.H. at least once a month. The court ordered mother, father, and A.A. to be present at the section 366.26 hearing.

The August 3, 2016 minute order and the juvenile court's written order signed on August 3, 2106 reflect that the court found that "[n]otice has been given as required by law."

A "Certificate of Mailing," filed August 5, 2016 in the Santa Cruz Superior Court, indicates that its clerk served a copy on father of "[W]rit Notice/Notice of Appeal" by mail sent to his prison address on August 5, 2016.

Father's "Notice of Intent to File Writ Petition and Request for Record to Review Order Setting a Hearing under Welfare and Institutions Code Section 366.26" (notice of intent) was filed in the Santa Cruz Superior Court on August 29, 2016. (See rule 8.450.) The notice of intent is signed by father, but the date is scribbled out. This court received father's notice of intent on August 31, 2016.

---

[6] At the August 3, 2016 hearing, A.A. testified regarding his desire to receive an additional six months of reunification services with respect to his son J.H. Mother was not present.

On September 7, 2016, this court received father's petition for extraordinary writ. The petition is signed by father and dated August 23, 2016. The mailing envelope, a copy of which is attached to the petition, is addressed to the Watsonville branch of the Santa Cruz Superior Court and bears a postmark dated August 26, 2016. A date stamp on the petition indicates that the Santa Cruz Superior Court received it on August 29, 2016, the same date that father's notice of intent was filed in the superior court.

The juvenile writ record was filed in this court on September 9, 2016. By letter dated September 9, 2016 and mailed to father's prison address, this court notified father that the last date for filing the writ petition would be September 19, 2016. (See rule 8.450(j)(2).)

Apparently due to this court's oversight, father's petition for extraordinary writ, which was received on September 7, 2016, was not filed in this court until October 11, 2016. The Department filed its response on October 26, 2016. (See rule 8.452(c)(2).)

II

Discussion

A. *Petition for Extraordinary Writ*

Father's writ petition seeks relief from the order setting a hearing under section 366.26 and requests a temporary stay pending the granting or denial of the petition. In the petition, father asserts that the order was erroneous because he "had no opportunity to contest [the] decision." The petition indicates that supporting documents are not attached to the petition because of exigent circumstances, namely, father was not notified of the hearing at which the challenged order was made and he was not "given documents on the hearing." The petition asks that we remand for hearing and direct the trial court to order visitation between N.H. and him.

B. *Legal Background*

Section 366.26, subdivision (*l*)(1), provides that an order setting a section 366.26 hearing "is not appealable at any time" "unless all of the following apply:

[¶] (A) A petition for extraordinary writ review was filed in a timely manner. [¶] (B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record. [¶] (C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits." (See rule 8.403(b)(1) [prerequisites for reviewing an order setting a section 366.26 hearing].) Section 366.26, subdivision (*l*)(4), states: "The intent of this subdivision is to do both of the following: [¶] (A) Make every reasonable attempt to achieve a substantive and meritorious review by the appellate court within the time specified in Sections 366.21, 366.22, and 366.25 for holding a hearing pursuant to this section. [¶] (B) Encourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits."

"Rules 8.450-8.452 and 8.490 govern writ petitions to review orders setting a hearing under Welfare and Institutions Code section 366.26." (Rule 8.450(a); see § 366.26, subd. (*l*)(3).) Consistent with section 366.26, subdivision (*l*)(4), rule 8.452(h)(1), provides: "Absent exceptional circumstances, the reviewing court must decide the petition on the merits by written opinion." "Rule 8.490 governs the filing, modification, finality of decisions, and remittitur in writ proceedings under [rule 8.452]." (Rule 8.452(i).)

"A party seeking writ review under rules 8.450-8.452 must file in the superior court a notice of intent to file a writ petition and a request for the record." (Rule 8.450(e)(1).) "The reviewing court clerk must immediately lodge the notice of intent" after receiving it from the superior court. (Rule 8.450(j)(1); see rule 8.450(g)(2)(A).) "When the notice is lodged, the reviewing court has jurisdiction of the writ proceedings." (Rule 8.450(j)(1).)

"The petition must be served and filed within 10 days after the record is filed in the reviewing court." (Rule 8.452(c)(1).) A reviewing court may summarily deny a procedurally defective writ petition. (See *Anthony D. v. Superior Court* (1998) 63

Cal.App.4th 149, 157.) But a writ petition "must be liberally construed" by the appellate court. (Rule 8.452(a)(1).)

C. *The Petition's Procedural Defects*

The Department urges us to dismiss father's writ petition on the following procedural grounds: (1) father failed to serve the petition as required by law and to file proof of service and (2) the petition was not accompanied by a memorandum of points and authorities, providing argument, citation of authority, and citation to the record.[7]

As indicated, rule 8.452, subdivision (c)(1) requires the writ petition to be "served and filed within 10 days after the record is filed in the reviewing court." Under the rule, the petitioner must serve a copy of the petition on all those mandated to receive service, including "[e]ach attorney of record" (rule 8.452.(c)(1)(A)). In its response to the writ petition, the Department states that this court's clerk e-mailed a copy of the petition to its counsel on October 12, 2016. It asserts that father failed to serve the required parties, pointing out that no proof of service accompanies the petition. No proof of service is attached to father's writ petition.

Further, under rule 8.452, the writ petition must be accompanied by a memorandum, which contains (1) "a summary of the significant facts, limited to matters in the record," (2) argument and citation of authority, (3) citation to the record. (Rule 8.452, subds. (a)(2), (b).) No memorandum of points and authorities is attached to father's petition. The petition does not provide a summary of the factual basis for the petition.

[7] The Department also suggests that we dismiss the petition on the ground it was not filed within 10 days after the record was filed in this court as required (rule 8.452, subd. (c)(1)). Our records show that our clerk's office received the writ petition before the record was filed in this court, but the clerk inadvertently did not file the writ petition once the record was filed. On our own motion, we deem the petition filed within the time prescribed by rule 8.452, subdivision (c)(1). Therefore, the Department's timeliness argument as to the writ petition is moot.

In addition, it appears that father's notice of intent may have been untimely filed. It was not filed within the time required by rule 8.450(e)(4)(B). Father's notice of intent does not reflect that he submitted the notice to prison authorities for mailing within the period for filing.[8] Neither does his notice of intent indicate good cause for late filing.[9]

The petition may be denied due to procedural deficiencies.

D. *Order Setting Section 366.26 Hearing Not Erroneous on Ground Asserted*

In addition, father's petition is rejected on the merits.

Father's grievance is that allegedly he had no opportunity to contest the juvenile court's decision to set a hearing under section 366.26 and he was not afforded a hearing. The record shows that a review hearing was in fact held on August 3, 2016 (not on August 5, 2016, as stated in father's writ petition). At that hearing, the juvenile court ordered a section 366.26 hearing to be held on November 29, 2016. Father was represented by counsel at the August 3, 2016 hearing, and, consequently, father had the opportunity to contest the setting of a section 366.26 hearing through his counsel.

In general, a parent is entitled to be present at all juvenile court proceedings. (§ 349; rules 5.530(b).) Special rules apply, however, to an incarcerated parent of a child on behalf of whom a petition under section 300 has been filed.

---

[8] Under the prisoner-delivery rule, "a notice of appeal by an incarcerated self-represented litigant in a civil case should be deemed filed as of the date the prisoner properly submitted the notice to prison authorities for forwarding to the clerk of the superior court." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 110.) Rule 8.25(b)(5), which is a rule applicable to the California Supreme Court and courts of appeal (see rule 8.4), provides: "If the clerk receives a document by mail from an inmate . . . in a custodial institution after the period for filing the document has expired but the envelope shows that the document was mailed or delivered to custodial officials for mailing within the period for filing the document, the document is deemed timely. The clerk must retain in the case file the envelope in which the document was received."

[9] "The superior court may not extend any time period prescribed by rules 8.450-8.452. The reviewing court may extend any time period but must require an exceptional showing of good cause." (Rule 8.450(d).)

Penal Code section 2625, subdivision (b), requires a superior court to order that notice be given to a prisoner of a proceeding to adjudicate that the prisoner's child is a dependent child of the court under section 300 and a proceeding under section 366.26 to terminate the prisoner's parental rights. (See Pen. Code § 2625, subd. (c).) "Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court." (*Id.*, subd. (d).) "No proceeding may be held under . . . [s]ection 366.26 . . . and no petition to adjudge the child of a prisoner a dependent child of the court pursuant to subdivision (a), (b), (c), (d), (e), (f), (i), or (j) of [s]ection 300 . . . may be adjudicated without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by [one of the specified persons] stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding." (*Ibid.*; see Rule 5.530(f)(2).[10])

"In any other action or proceeding in which a prisoner's parental . . . rights are subject to adjudication," the court *may* issue an order requiring the prisoner to be temporarily removed from the institution and produced before the court. (Pen Code § 2625, subd. (e).) Rule 5.530(f)(3) provides: "For any other hearing in a dependency proceeding [other than a jurisdictional hearing, a disposition hearing, or a section 366.26 hearing in which termination of parental rights is at issue], including but not limited to a detention hearing or *a review hearing*, the court *may* order the temporary removal of the

[10] Rule 5.530(f)(2) states: "The court must order an incarcerated parent's temporary removal from the institution where he or she is confined and production before the court at the time appointed for any jurisdictional hearing held under section 355 or dispositional hearing held under section 358 or 361, and any permanency planning hearing held under section 366.26 in which termination of parental rights is at issue."

incarcerated parent from the institution where he or she is confined and the parent's production before the court at the time appointed for that hearing." (Italics added.) Thus, the juvenile court had discretion to, but was not required to, order father to be temporarily removed from state prison and produced at the review hearing on August 3, 2016.

An incarcerated parent may still have an opportunity to participate in a dependency hearing even if the parent waived a right to be physically present at the hearing or if the juvenile court did not make a discretionary order for the parent to be produced for the hearing. In such circumstances, a juvenile court may in its discretion give the incarcerated parent "the opportunity to participate in the hearing by videoconference, if that technology is available, and if that participation otherwise complies with the law." (Pen. Code, § 2625, subd. (g).) Alternatively, "teleconferencing may be utilized to facilitate parental participation" "[i]f videoconferencing technology is not available."[11] (*Ibid*.) Rule 5.530(f)(1)(B) specifies: "Notice to an incarcerated parent of a detention hearing, *a review hearing*, or any other hearing in a dependency proceeding must inform the incarcerated parent of his or her options for requesting physical or telephonic appearance at and participation in the hearing." (Italics added.)

Although father's petition does not explicitly assert that he had a right to be physically present at the August 3, 2016 hearing, we consider such implicit contention and reject it because he had no right to be physically present at the review hearing.

---

[11] Penal Code section 2625, subdivision (g), is implemented by rule 5.530(f)(6), which provides: "The court may, at the request of any party or on its own motion, permit an incarcerated parent, who has waived his or her right to be physically present at [a jurisdictional hearing, a dispositional hearing, or a section 366.26 hearing in which termination of parental rights is at issue] or who has not been ordered to appear before the court, to appear and participate in a hearing by videoconference consistent with the requirements of rule 5.531," or "[i]f video technology is not available," "to appear by telephone consistent with the requirements of rule 5.531." "The court must inform the parent that, if no technology complying with rule 5.531 is available, the court may proceed without his or her appearance and participation." (Rule 5.530(f)(6).)

(See Pen. Code, § 2625; rule 5.530; *In re Jesusa V.* (2004) 32 Cal.4th 588, 601 (*Jesusa V.*) [prisoners do not have "a constitutional right to be *personally present* at every type of hearing"].) We can infer that father's counsel had notice of the August 3, 2016 hearing since he appeared at the hearing on father's behalf. Further, in the absence of any contrary indication, a court may assume that an attorney is competent and fully communicates with his client about a proceeding. (See *Conservatorship of John L.* (2010) 48 Cal.4th 131, 156-157.) We conclude that procedural due process was satisfied. (*Jesusa V.*, *supra*, at p. 602 [no due process violation when the juvenile court determined father's presumed father status while father was physically absent, but represented by his attorney].)

Even assuming that father was not given notice of the August 3, 2016 hearing as required by statute or rule (see § 293; rules 5.530(f)(1)(B), 5.708(b)), any such failure must be regarded as harmless error, even if such notice would have resulted in his personal appearance at or participation in the hearing. The time period for providing family reunification services to a parent of a child who was under the age of three when initially removed had expired by the time of the August 3, 2016 hearing (see §§ 361.5, subd. (a); 366.21, subd. (e)(3)). Father's petition does not present any substantive basis for contesting the order setting the section 366.26 hearing. Based on the record before us, there is no reasonable probability that the juvenile court would have reached a more favorable result had father been given notice concerning the August 3, 2016 hearing as required by statute or rule and had he been present at, or participated in, the hearing. (See Cal. Const., art. VI, § 13; cf. *Jesusa V.*, *supra*, 32 C.4th at p. 625.)

DISPOSITION

The petition for extraordinary writ is denied. The request for a temporary stay is denied as moot. Our decision is immediately final as to this court. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

_____

ELIA, ACTING P.J.

WE CONCUR:

_____

BAMATTRE-MANOUKIAN, J.

_____

MIHARA, J.

A.R. v. Superior Court
H043895